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OCTOBER TERM, 1980

SUPREME COURT OF THE UNITED STATES

MARK J. MILLS, MICHAEL GILL AND WILLIAM MALAMUD,

Petitioners,

v.

RUBIE ROGERS, ABLE BOLDEN, BETTY BYBEL, JAMES COLLERAN, DONNA HUNT, WILLIE WADSWORTH, AND HAROLD WARNER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MOTION TO DISMISS WRIT OR IN THE ALTERNATIVE CERTIFY CERTAIN QUESTIONS TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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QUESTION PRESENTED

1. Whether this Court should dismiss the writ of certiorari or in the alternative certify the question of the right of mental patients to refuse anti-psychotic medication to the Supreme Judicial Court of Massachusetts in light of a recent decision by that Court resolving similar issues on state law grounds?

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STATEMENT OF THE CASE

The Respondents' adopt the statement of the case in its brief.

SUMMARY OF THE ARGUMENT

I

This Court should find that it need not reach the Constitutional issues raised in this case in light of the recent decision of the Massachusetts Supreme Judicial Court, resolving similar issues on state law grounds. The decision in that case clearly states that the rules it established for forcibly medicating non-hospitalized but incompetent mentally ill persons with anti-psychotic drugs are to be applied by Massachusetts Courts presented with similar situations.

II

Under Massachusetts state law, competent and incompetent persons have a fundamental right to refuse anti-psychotic drugs absent

an "overwhelming state interest." Incompetent persons exercise this right through the substituted judgement standard, a determination of what the incompetent person would have done if competent.

III

The Supreme Judicial Court held that under Massachusetts law commitment to a hosptal is not an adjudication of incompetence to make treatment decisions. Before a patient may be treated as incompetent to make treatment decisions, a court must specifically adjudicate him incompetent. In addition, the Court held that civil commitment is not a sufficient justification to forcibly medicate patients under the state's parens patriae power. Therefore this Court need not reach the issue of what procedures are Constitutionally due or the Constitutional limits on the power of the state to forcibly drug patients under the state's parens patriae power.

IV

The Court held that when drugs are used to prevent or control violence they serve as chemical restraints. Since a Massachusetts statute and Department of Mental Health regulations regulates the use of drugs as a restraint in mental hospitals this Court need not decide when a state may Constitutionally medicate a patient pursuant to the state police power.

V

Since Massachusetts requires a judicial adjudication of incompetence, prior court approval and the application of the substituted judgement standard, before an incompetent person may be forcibly medicated with anti-psychotic drugs, any remand would require the adoption of these state procedures, thereby obviating the need for this Court to determine if principles of federalism were violated by the Court of Appeals remand order.

ARGUMENT

I. THE WRIT OF CERTIORARI SHOULD BE DISMISSED

The petition for a writ of certiorari in this case was filed by the defendant-petitioners and was granted prior to a decision issued by the Massachusetts Supreme Judicial Court, titled In the Matter of Guardianship of Richard Roe III, Mass. Adv. Sh. (1981) 981, 421 N.E. 2d 40 (Mass. 1981), a case which resolves the issues of this case on state law grounds. Thus, as a matter of federalism, this Court should decline to rule on any of the Constitutional issues presented in the case. This Court should dismiss the writ of certiorari or in the alternative, if it has any doubts of the applicability of Roe to the facts of this case, cerfify certain legal questions to the Supreme Judicial Court of Massachusetts.

The primary issue before the Supreme Judicial Court in the Roe case concerned the means by which non-institutionalized but

mentally ill persons who have been adjudicated incompetent by a court, are to exercise their right to refuse anti-psychotic drugs, since they are deemed to be incapable of exercising it personally. Although the Court limited the decision to non-institutionalized individuals, the Court's findings, rulings and statutory interpretations resolve the issues presented to this Court in the instant case under state law. In addition, the decision in that case clearly stated that the rules and criteria established in Roe are to be applied by Massachusetts Courts presented with similar situations. Roe, supra, at p. 999, 1021. The instant case is exactly the type of case the Supreme Judicial Court anticipated and required the application of the rules set out in Roe.

A. In Interpreting Massachusetts State Law, the Supreme Judicial Court Held That All Persons Have A Common Law Right to Refuse Anti-Psychotic Drugs.

Prior to reaching the primary issue

presented by the case the Court in Roe reaffirmed its prior holdings that all competent persons in Massachusetts have a fundamental right to refuse treatment, "absent an overwhelming state interest," based on both the Constitutional Right to Privacy and the state common law right of every person "of adult years and sound mind...to determine what shall be done with his/her own body." Roe, supra, at p. 1000, fn. 9. The Court also went on to reaffirm that all incompetent persons retain the right to refuse anti-psychotic drugs under state law, which they may exercise through substituted judgment, a determination of what the incompetent person would have done if competent. Roe, supra, at p. 1001.

The substituted judgment standard is very different from the best interest standard that is traditionally applied in guardianship matters. For example, where the patient, when competent, has expressed an

opinion regarding medication, under the substituted judgment standard, this position will be respected, even if it is not perceived by others to be in the best medical interest of the patient. In re Spring, 405 N.E. 2d 115, 159 (Mass. 1980) Roe, supra, at p. 1001, 1017 fn. 20. In addition, if a patient, who has been declared incompetent, articulates a preference to be treated or not treated, this opinion is considered a "critical factor" and should generally be honored as long as the opinion is based on a sensible belief. Doe v. Doe, 377 Mass. 272, 385 N.E. 2d 995, 1000 (Mass. 1979). In re Spring, supra, at p. 121, Roe, supra, at p. 1012. The substituted judgment standard gives great weight to the sanctity of the individual.

B. Under Massachusetts Law, Absent An Emergency, The State Does Not Have A Sufficient State Interest To Forcibly Drug Involuntarily Committed Patients Under the Parens Patriae power unless the patient is Specifically Adjudicated Incompetent To Make Their Own Treatment Decisions.

The defendants present three arguments for their claim that state law and the state's parens patraie power gives them the authority to forcibly drug patients. First, the defendants argue that as a matter of Massachusetts law involuntary committed patients, as a result of being committed by a court, are judicially determined to be unable to make treatment decisions by virtue of the court commitment hearing. The defendants assert that under Massachusetts law civil commitment and its concomitant finding of "mental illness" constitute a sufficient determination of incapacity to justify forcing anti-psychotic drugs over the objections of the patients. The defendants also claim this is true whether the patient is

committed pursuant to the state's police or parens patriae power. Secondly, the defendants argue that under state law as a result of the issuance of a court involuntary commitment order is the authority and the duty to involuntarily treat. Finally, they assert that state law provides them the administrative discretion to forcibly drug patients since the "treatment is directly related to the purpose for which mental patients in Massachusetts are committed." (Defendants brief at p. 12.) As will be shown, each of these three rationales for exercising parens patriae forced drugging is unsupportable as a matter of state law.

1. In Interpreting Massachusetts Law, The Supreme Judicial Court Has Held That Committment To A Hospital In Massachusetts Is Not An Adjudication Of Incompetency Nor Does Commitment Mean That A Patient Is Incompetent To Make Treatment Decisions.

The District Court and the Court of Appeals found that under Massachusetts

statutory law and judicial precedent a committed patient is not deemed to be incapable of making treatment decisions. The District Court and Court of Appeals also held that under Massachusetts law the state did not have a duty to provide anti-psychotic drugs forcibly under its parens patriae power, and that before such treatment could be forced an involuntary patient had to be specifically adjudicated incompetent by a court. (App. at p. 16a-26a, 73a-75a).

In Roe, the Supreme Judicial Court explicitly held that the District Court and Court of Appeals' decisions were correct in their interpretation of the Massachusetts commitment statute. The Court declared that under Massachusetts law there is a "profound" distinction between commitment and the finding of mental illness, and a determination of incompetency to make treatment decisions. The Court stated that under Massachusetts law, even if a person is found

to be generally incompetent to handle his or her affairs, without an independent judicial finding of incompetency to make anti-psychotic treatment decisions, a ward would still legally retain the capacity to make the "treatment decision of this magnitude." Roe, supra, at p. 1009. The Supreme Judicial Court in Roe, supra, at p. 1008, 1009 merely reaffirmed Massachusetts law that commitment to a hospital and a judicial finding of mental illness is not an adjudication or finding that the patient is unable to make his own treatment decisions, or that a patient's thoughts are so disordered as to be irrational.[1] Therefore, Roe specifically rejects the defendants' argument that under

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[1]The The American Psychiatric Association at fn. 6, p. 8 of its brief recognizes this when it distinguishes Massachusetts law from states in which a parens patriae commitment includes a finding of incapacity. For those states the defendants are correct that patients can no longer personally retain the right to refuse since their commitment is an adjudication of incompetency to make treatment decisions.

state law the Commonwealth assumes the "decision making role" for committed patients merely because they are mentally ill." (See defendants brief at p. 13).

2. In Interpreting Massachusetts Law, The Supreme Judicial Court Has Held That Commitment Does Not Justify Forced Medication Under The State's Parens Patriae Power.

The Court in Roe, supra, at p. 1009, stated that under Massachusetts law the

> "commitment decision itself is an inadequate predicate to the forcible administration of drugs to an individual where the purported justification for that action is the State's parens patriae power."

Since the Supreme Judicial Court, interpreting state law, has held the state does not have the authority to forcibly drug patients under the parens patriae power, whether based on a 'duty to treat' or an 'administrative discretion' theory, this Court need not address whether Massachusetts may Constitutionally force anti-psychotic drugs on civilly committed patients.

The Court of Appeals also expressed concern regarding the time involved in obtaining an adjudication of incompetence. Its' concern was that during the period of delay in judicial action, the failure to medicate would cause the patient to deteriorate significantly. The Court of Appeals held that during this limited period the doctors could authorize forced medication, under the parens patriae power, without a judicial finding of incompetence. (App. at p. 24a-26a).

The Supreme Judicial Court directly addressed this section of the Court of Appeals decision. Roe, supra, at p. 1008. Although agreeing with the Court of Appeals that a patient's interest would not be furthered by requiring doctors or other parties to stand by and watch a patient slip into chronic illness while awaiting an adjudication, it stated that in cases of actual emergencies, where there may be an

immediate, substantial and irreversible deterioration of a person who is seriously mentally ill, Massachusetts courts can hear a case and rule in a matter of hours. In effect the Court held that in Massachusetts this section of the Court of Appeals' decision is irrelevant.

C. In Its Interpretation of Massachusetts Law, The Supreme Judicial Court In Roe Settled the Issue of At What Point A Patient's Right To Refuse May Be Overridden By The State's Police Power.

A primary dispute between the parties in Rogers v. Okin is at what point a doctor can forcibly medicate a patient to prevent or control violence, thereby overriding the patient's right to refuse, i.e., what constitutes an emergency.

The defendants claim that medication used under the police power is used to treat dangerousness and not to chemically restrain patient's dangerousness. This is important because Massachusetts General Laws, Chapter

123 §21 and Department of Mental Health Regulation §223.02 specifically hold that when medication is used to restrain dangerous behavior it can only be used in cases where there is "a serious threat of or a result of extreme violence, a personal injury or attempted suicide." (App. at p. 18, 25.) (See also PF # 165-267.) (App. at p. 177-179.) This state statutory and regulatory standard is similar to the District Court's standard, which authorized forced medication under the police power, "in an emergency situation in which a failure to do so would result in a substantial likelihood of physical harm to the patient, other patients or staff members of the institution. (App. at p. 85a.)

However, the state statutory and regulatory standard is substantially more stringent than the police power standard adopted by the Court of Appeals. (App. at p. 14a.)

Neither the District Court nor the Court

of Appeals directly addressed nor discussed why they were not legally bound to apply the state statutory and regulatory standard for the use of these drugs as a chemical restraint, to the use of these drugs to 'treat' dangerousness.[2]

Although the Supreme Judicial Court in Roe, supra, did not specifically mention M.G.L. Chapter 123, §21, or D.M.H. Reg. §223.02, the Court did hold that when anti-psychotic drugs are used to protect the public safety and to prevent violence, the drugs "function as chemical restraints" Roe, supra, at p. 1018.

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[2]On May 1st, 1978, during the pendency of the suit, the Department of Mental Health Regulations were revised to clarify the rules regarding restraint. The Regulations state that any medication given to patients involuntarily or forcibly in an emergency is medication for chemical restraint, and therefore must comply with DMH Regulations that regulate restraint and seclusion. (PF #267.) (App. at p. 179.) (See also Addendum.)

The Court's decision in Roe implicitly requires that for police power medications the state statutory and regulatory standard rather than the Court of Appeal's Constitutional standard should be applied. Police power medications, by definition, are used to prevent violence. Since such drug use has been held under Massachusetts law to "function as chemical restraints," the Massachusetts mental health statute and D.M.H. regulations require that medication used as a "chemical restraint" only be used "in cases of an emergency, where there is a serious threat of or a result of extreme violence, personal injury or attempted suicide." M.G.L., Chapter 123 §21, D.M.H. Reg. 223.02, (App. at p. 18, 19, 25.)[3]

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[3]Under the revised Department of Mental Health regulations concerning its restraint and seclusion policy, emergencies are said to exist when there is a substantial risk, or occurrence, of self destructive behavior or physical assault. Substantial risk is defined as the serious imminent threat of bodily harm combined with the present ability to inflict such

D. The Federalism Issues The Defendants Claim Are Raised By the Court of Appeals Remand Order Has Been Resolved By The Roe Decision.

The First Circuit remanded the case to the trial court with instructions "to be creative in designing procedural mechanisms." (App. at p. 14a-15, 29a.) The defendants argue that principles of federalism are violated by this remand order.

The District Court decision held that once a patient was adjudicated incompetent under state law, a guardian must be appointed to make treatment decisions on behalf of that patient. (App. at p. 76a-81a.)

Without finding that the state guardianship law was unconstitutional or that the District Court's interpretation of state law

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harm. Given an emergency situation, the less restrictive means of restraint is to be used. (App. at p. 106a-107a.) (See also PF #267.) (App. at p. 179.) (See also Addendum.)

was erroneous, the Court of Appeals declared that it would not be necessary for guardians to be appointed or consulted before physicians made medication decisions, based on the substituted judgment standard, for patients judicially declared incompetent. Although its reasoning is not altogether clear, the Court of Appeals seemingly based this ruling on its interpretation of Constitutional law. The Court of Appeals then remanded to the District Court the question of what procedures were constitutionally required. The Court also indicated the need to establish an independent review mechanism to review the decision maker's application of the substituted judgment standard. (App. at p. 24a-28a.)

In Roe, the Massachusetts Supreme Judicial Court specifically held that the District Court and Court of Appeals' interpretation of Massachusetts law in regards to the procedures for forcibly

administering anti-psychotic drugs to incompetent patients was incorrect. Roe, supra, at p. 995, n. 5.

The Court held that under state law, for certain extraordinary medical treatments, including anti-psychotic drugs, only courts would have the authority to determine if the treatment of incompetent persons should be provided. Roe, supra, at p. 1000, 1001.

The Supreme Judicial Court stated that the application of substituted judgment, a standard which requires the decision maker to determine what the ward would have decided to do if competent, is difficult for the "most capable, detached and diligent decision maker". It held that since a parent or guardian would have "to ignore all but the implementation of the values and preference of the ward", Roe, supra, p. 1009, 1010, the decision of whether to authorize the forcible administration of anti-psychotic drugs under Massachusetts law is best left to a judicial

decision maker to "ensure the objectivity which other processes might lack." Roe, supra, at p. 1010.

The court also identified three other factors which persuaded it that a guardian did not have the inherent authority to consent to anti-psychotic drug treatment and that only a court, under Massachusetts law, had the power to ultimately authorize such medication for an incompetent person. These included the intrusiveness of the drug, the probability that the patient would experience adverse side effects and the fact that a court needed to be involved, under Massachusetts law, in the adjudication of incompetence. Roe, supra, at p. 1002-1010.

Since the Court determined that judicial adjudication of incompetence, prior judicial approval and the application of the substituted judgment standard was necessary under state law, before any incompetent individual may be forcibly medicated with anti-psychotic

drugs, on remand the District Court would be mandated to adopt these state procedures, as articulated by the highest court of Massachusetts. States, of course, may establish procedural mechanisms and substantive rights that provide greater protection than the Constitution mandates. Parham v. J.R., 442 U.S. 584, 99 S. Ct. 2493, 61 L.Ed. 2d 101 (1979).

Even though the Roe decision refers on a number of occasions to the District Court and Court of Appeals' decisions in Rogers v. Okin, it is clear the decision is grounded upon state Constitutional grounds, state common law, the inherent power of the Court, as well as Federal Constitutional grounds. Roe, supra, at p. 1000, fn. 9.

Since there is no question that the rights created and the state procedures established in Roe meet the Constitutional minimum, and since they rest upon adequate and independent state law grounds, principles

of federalism require this Court to decline to reach the merits of the instant case. See Herb v. Pitcairn, 324 U.S. 117, 125, 65 S. Ct. 459, 89 L. Ed. 2d 789 (1945).

II. IF THIS COURT HAS ANY DOUBTS THAT ROE RESOLVES THE ISSUES IN THE CASE UNDER ADEQUATE AND INDEPENDENT STATE LAW GROUNDS IT SHOULD CERTIFY THE QUESTIONS TO THE MASSACHUSETTS SUPREME JUDICIAL COURT.

If this Court has any doubts that the Supreme Judicial Court's decision in Roe resolves the issues in this case, under adequate and independent state law grounds, this Court should abstain from deciding the Constitutional issues presented in the case and certify to the Massachusetts Supreme Judicial Court certain legal questions concerning the meaning and applicability of Roe to the instant case before reaching the merits. An interpretation of Massachusetts law, after Roe, may avoid or substantially modify the Constitutional issues presented by the case at bar.

> Abstention is appropriate in cases presenting a federal Constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law. Colorado River Water Conservation Dist. v. U.S., 424 U.S. 812, 813, 96 S.Ct. 1236, 47 L.Ed. 2d 483 (1976) citing County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 189, 79 S.Ct. 1060, 3 L.Ed. 2d 1163 (1959). See also Bellotti v. Baird, 428 U.S. 132, 146, 96 S.Ct. 2857, 2866, 49 L.Ed. 2d 844 (1976), citing to Harrison v. N.A.A.C.P., 360 U.S. 167, 177, 79 S. Ct. 1025, 1030, 3 L.Ed. 2d 1152 (1959).

The Supreme Judicial Court of Massachusetts has a Rule of Court under which an issue concerning the interpretations of Massachusetts law may be certified directly to the court for prompt resolution. Mass. Rules of Court, Sup. Jud. Ct., Rule 1:03 (1981). (See Addendum.) See Bellotti v. Baird, supra, 96 S. Ct. at p. 2867. See also Henderson v. Sears, 495 F.2d 513 (1st Cir. 1974).

The availability and resort to an adequate certification procedure in this case "in the long run saves time, energy and resources and helps build a cooperative

judicial federalism." See Belotti v. Baird, supra, 96 Sup. Ct. at p. 1868, citing to Lehman Brothers v. Schein, 416 U.S. 386, 391, 94 S. Ct. 1741, 1744, 40 L. Ed. 2d 215, 220 (1974).

This Court should certify the following questions of law to the Massachusetts Supreme Judicial Court.

1. Do competent and incompetent civilly committed patients have the right to refuse anti-psychotic drugs under the state law?
2. Is commitment to a mental hospital synonymous with incompetence to make anti-psychotic drug treatment decisions under Massachusetts law?
3. In Massachusetts, before civilly committed patients may be treated as incompetent to make treatment decisions, must they be specifically adjudicated incompetent to make treatment decisions by a court?

4. Under Massachusetts law is the commitment decision itself an adequate predicate to the administration of anti-psychotic drugs to an involuntarily committed individual where the purported justification for that action is the state's parens patriae power?

    a. When does the state's parens patriae power override an involuntarily committed patient's right to refuse anti-psychotic drugs?

5. Does Massachusetts law require prior court approval, based on the substituted judgment standard, before a doctor may treat an incompetent civilly committed mentally ill person with anti-psychotic drugs?

6. When anti-psychotic drugs are administered to involuntarily committed patients to protect the safety of other patients or to prevent or control violence, do the drugs, under

Massachusetts law, function as chemical restraints?

a. If the drugs in those circumstances function as chemical restraints, are state doctors required to follow the state law, M.G.L. c.123 §1, 21, and Department of Mental Health Regulations which requires their use only "in cases of emergency, where there is a serious threat of or as a result of extreme violence, personal injury or attempted suicide?"

CONCLUSION

For the reasons set forth above, the respondents request that this Court dismiss the writ of certiorari or in the alternative certify certain legal questions to the Supreme Judicial Court of Massachusetts.

Respectfully submitted

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ADDENDUM

Departmental Policy Regarding Seclusion and Restraint

As of May 1, 1978, Departmental policy regarding seclusion and restraint will inlcude the following points.

1. The indications for seclusion/restraint procedures during emergency situations are now defined as:

    Substantial Risk of Serious Physical Assault

    Occurrence of Serious Physical Assault

    Substantial Risk of Serious Self-Destructive Behavior

    Occurrence of Serious Self-Destructive Behavior

'Substantial Risk' shall be interpreted to include only the serious, documented threat of imminent bodily harm, where there is the present ability to enact such harm.

'Self-Destructive Behavior' shall be interpreted to include not only overt behaviors such as suicide attempts with dangerous weapons, the repeated biting of one's own

flesh, or severe head-banging, but also such acts as the serious attempts of agitated persons to remove stitches, casts, bandages; to engage in prolonged coprophagia; or to resist immobilization after a difficult surgery when a state of physical rest is indicated but appropriate medications are contraindicated. This category also pertains to those medically endangered, extremely hyperactive or otherwise dependent persons who must be contained for metabolic reasons.

Drawing upon the authority contained within General Laws Chapter 23, Section 21, chemical restraint shall be defined as the administration of a pharmacological agent during an emergency situation involving either the substantial risk of serious physical assault, the occurrence of serious physical assault, the substantial risk of serious self-destructive behavior, or the occurrence of serious self-destructive behavior.

RULE 1:03.

UNIFORM CERTIFICATION OF QUESTIONS OF LAW

Section 1. Authority to Answer Certain Questions of Law.

This court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or of the District of Columbia, or a United States District Court, or the highest appellate court of any other state when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of this court.

Section 2. Method of Invoking.

This rule may be invoked by an order of any of the courts referred to in Section 1 upon that court's own motion or upon the motion of any party to the cause.

Section 3. Contents of Certification Order.

A certification order shall set forth:

1. the question of law to be answered; and

2. a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

Section 4. Preparation of Certification Order.

The certification order shall be prepared by the certifying court, signed by the judge presiding at the hearing, and forwarded to this court by the clerk of the certifying court under its official seal. This court may require the original or copies of all or of any portion of the record before the certifying court to be filed with the certification order, if, in the opinion of this court, the record or portion thereof may be necessary in answering the questions.

Section 5. Costs of Certification

Fees and costs shall be the same as in civil appeals docketed before this court and shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification.

Section 6. Briefs and Arguments.

Proceedings in this court shall be those provided in these rules, the Massachusetts Rules of Appellate Procedure or statutes governing briefs and arguments, so far as reasonably applicable.

Section 7. Opinion.

The written opinion of this court stating the law governing the questions certified shall be sent by the clerk under the seal of this court to the certifying court and to the parties.

Section 8. Power to Certify.

This court on its own motion or the motion of any party may order certification of

questions of law to the highest court of any state when it appeals to the certifying court that there are involved in any proceeding before the court questions of law of the receiving state which may be determinative of the cause then pending in the certifying court and it appears to the certifying court that there are no controlling precedents in the decisions of the highest court or intermediate appellate courts of the receiving state.

Section 9. Procedure on Certifying.

The procedures for certification from this state to the receiving state shall be those provided in the laws of the receiving state.

Section 10. Uniformity of Interpretation.

This rule shall be so construed as to effectuate its general purpose to make uniform the law of those states which adopt it; or enact a uniform certification statute.

Section 11. Short Title.

This rule may be cited as the Uniform Certification of Questions of Law Rule.